United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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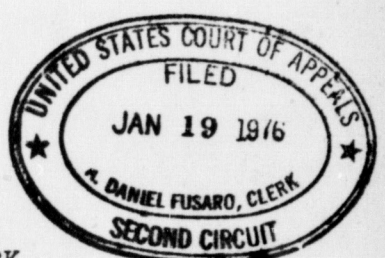
P/S

75-1371

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellant, -against- ISRAEL RODRIGUEZ, Appellee.	Docket No. 75-1371

PETITION FOR REHEARING
WITH SUGGESTION
FOR REHEARING EN BANC



ON APPEAL BY THE GOVERNMENT
FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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PETITION FOR REHEARING
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FOR THE EASTERN DISTRICT OF NEW YORK

Israel Rodriguez files this application for rehearing with suggestion for rehearing en banc pursuant to Rule 40(a), Federal Rules of Appellate Procedure, from a decision of the United States Court of Appeals for the Second Circuit (Timbers and Moore, C.JJ.; Coffrin, D.J.*) entered on January 5,

*Chief Judge, United States District Court for the District of Vermont, sitting by designation.

1976,* reversing an order of the United States District Court for the Eastern District of New York (Bartels, D.J.) dismissing an indictment for failure to comply with the Eastern District Plan for Prompt Disposition of Criminal Cases.

Statement of Facts

On December 3, 1974, Luis and Jose LaBoy and appellee Rodriguez were arrested for an alleged attempted sale of cocaine to a Government undercover agent. The three were arraigned on December 4, 1974, on a complaint by an undercover agent asserting that a reliable informer was the source of information.

On February 14, 1975, an indictment was filed charging the LaBoys with conspiracy between November 21, 1974, and December 3, 1974, to distribute cocaine through a sale to an undercover agent named Ronald Melvin. A second count of the indictment charged the two men with possession with intent to distribute cocaine. Appellee Rodriguez, however, was not indicted. On March 10, 1975, the LaBoys were arraigned. The Government filed a notice of readiness on May 2, 1975, and a trial date of May 19, 1975, was set.

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*The opinion of the Court of Appeals is annexed hereto as Exhibit A.

On May 19, 1975, the day set for the trial of the LaBoy brothers, the Assistant U.S. Attorney requested an adjournment of the proceedings, saying, "It is my intention to indict [appellee Rodriguez] this afternoon" (M.3*).

Assistant U.S. Attorney Corcoran explained that he had never spoken with the Government informer, that he had relied on the undercover agent's reports for his presentation to the grand jury, and that he did not know about Rodriguez' involvement in the crime. Assistant U.S. Attorney Marks stated that the case had been reassigned to him over the weekend (M.8), and that when he met the informer on May 17, the Saturday prior to the trial date, he learned of that information (M.12). Mr. Marks asserted that on Sunday, May 18, 1975 (M.11), he telephoned Rodriguez and told him that two agents would pick him up and bring him to the courthouse for an interview (M.11). At that point, Rodriguez allegedly volunteered the information that he was testifying for the defense (M.11).

Mr. Marks asserted that he was prepared to go to trial as soon as Rodriguez had an opportunity to prepare his case (M.13). The District Judge noted that this action by the Government had put everyone in an embarrassing position because the Judge could not try any cases until July due to

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*Pages of the transcript of the May 19, 1975, proceeding are designated by numerals in parentheses preceded by "M."

his scheduled vacation (M.13).

The Judge agreed to hold the LaBoys' suppression hearing pursuant to Rule 41 of the Federal Rules of Criminal Procedure that day and otherwise to adjourn the case until a date convenient for counsel some time after June.*

The Judge then instructed someone to get in touch with Joanna Seybert, the attorney with The Legal Aid Society, Federal Defender Services Unit, who had been assigned to represent Rodriguez at the preliminary proceedings before the magistrate but who was not then in court (M.14; Minutes of July 18, 1975, at 16). When Ms. Seybert appeared, Judge Bartels informed her that Rodriguez was to be indicted that afternoon (M.16**), told her to confer with other counsel about her schedule (M.16), and stated that everything counsel for the LaBoys received on behalf of their clients would be delivered to her (M.16). Co-counsel then stated that all defense counsel agreed on July 29, 1975) (M.17) as a trial date. Ms. Seybert stated that, in response to her inquiry, the Assistant U.S. Attorney advised her that the six month period had not passed (M.17; Minutes of July 18, 1975, at 6). Judge Bartels then set July 29, 1975, as the date for trial, subject to further adjournment to August 4, 1975 (M.17).

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*Judge Bartels was to be on vacation during June.

**The transcript at line 9 is obviously erroneous when it states that it "hasn't" been decided. Such errors appear throughout the transcript.

Later, Ms. Seybert explained that she was not prepared, that she had not seen her client in several months, that her client might not be indicted, and that she had four other matters on that day, including an 11:00 a.m. magistrate's calendar.

Judge Bartels agreed to permit Ms. Seybert to make any further motions she wanted to make for appellee Rodriguez, but required her presence in the courtroom. The LaBoys' suppression hearing then took place.

On May 19, 1975, a superseding indictment was filed charging a conspiracy among appellee Rodriguez and Luis and Jose LaBoy to distribute cocaine on November 21, 1974, and possession of cocaine with intent to distribute.

It was not until May 28, 1975, that a notice was sent by the United States Attorney's office, scheduling the arraignment for June 5, 1975 -- two days after the expiration of the six month period and at a time when it was known that Judge Bartels would be on vacation.

On June 6, 1975, in the absence of Judge Bartels, the arraignment was held before Judge Orrin G. Judd. Defense counsel stated that she had received no notice of the indictment until May 28, 1975, and that entry of a plea of not guilty was not to be construed as a waiver of rights under the Prompt Disposition Plan (Minutes of June 6, 1975, at 7). Counsel also indicated that she had not "really been informed of any discovery," and the Assistant U.S. Attorney agreed to give the

material to her (Minutes of June 6, 1975, at 8).

On June 30, 1975, the Government filed a notice of readiness for trial.

By notice of motion dated July 8, 1975, defense counsel sought dismissal of the indictment for failure to comply with the "prompt disposition" rules.

In his affidavit in opposition to the motion to dismiss, Assistant U.S. Attorney Marks reiterated that the U.S. Attorney's office had not sought an indictment against Rodriguez because, from December 3, 1974 -- the date of the crime -- until May 17, 1975 -- two days prior to the scheduled trial -- no prosecutor had ever interviewed the Government's informant in this case, although the informant's identity was known.

On September 8, 1975, Judge Bartels dismissed the indictment. In his opinion,* Judge Bartels found that the six month period expired on June 3, 1975, and that, although the Government had announced its readiness on May 19, 1975, the failure to calendar the case for arraignment on or before June 3, 1975, was a clear violation of Rule 4 of the Prompt Disposition Plan. Relying on United States v. Bowman, 493 F.2d 594 (2d Cir. 1974), and United States v. Valot, 473 F.2d 667 (2d Cir. 1974), the Court concluded that a notice of readiness is not effective until issue is joined. The District Judge found no excusable neglect which would permit a delay, and also stated:

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*Judge Bartels' opinion dismissing the indictment is annexed hereto as Exhibit B.

> ... The Government attempts to explain its failure to indict Rodriguez until May 19, 1975, on the ground of newly discovered evidence from an informant. It must be noted, however, that the reason for the delay in receiving this new information was the failure on the part of the attorneys for the Government to interview the informant until two days prior to the scheduled trial date despite the fact that his identity was known. Instead of interviewing the informant himself, the Government chose to rely solely on an agent's report concerning the information available from the informant. This clearly amounted to inadequate investigation.
>
> Opinion of September 8, 1975, at 4-5.

The Government then sought reconsideration of the order dismissing the indictment. It was argued that the Government had complied with the rules by the oral notice given on May 19, 1975, and, because on May 19, both a trial date had been set and discovery ordered, the arraignment was meaningless. Alternatively, the Government stated that the late arraignment was due to excusable neglect. In rejecting the Government's position that it was ready for trial, the District Court stated:

> ... Readiness without the ability to go to trial is meaningless.
>
> Minutes of September 16, 1975, at 20.

In an opinion dated September 18, 1975,* Judge Bartels reaffirmed his earlier decision:

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*This second opinion is annexed hereto as Exhibit C.

> [The argument that the late arraignment in this case was a mere formality] ignores the simple fact that Rule 4 of the Plan required the Government to be ready for trial within six months from the date of Rodriguez's arrest and that having failed to arraign Rodriguez within that six-month period, it could not possibly have been ready for trial until three days after the six months since until arraignment it would have been impossible to try the case.... While the Bowman Court did not require that the case be actually tried within the six-month period, it held that in order to be ready for trial the Government must first arraign the defendant. The essence of that requirement and the concern of the Court were to insure the prompt disposition of criminal cases by avoiding all forms of prosecutorial delay, including delay in arraignment....
>
> An arraignment serves a much more important purpose than simply providing a time for the assignment of a judge, who in turn will set a trial date and order discovery; as stated in Bowman, the purpose of Rule 4 was "to insure that the government would file its notice of readiness only after pleading." Id. It is true that while on May 19, 1975, all material turned over to the other defendants was ordered delivered to Rodriguez, his counsel was expressly accorded the right to make any motions at a later date. Under Rule 16(f) Rodriguez had a right to make discovery motions at any time within ten days after arraignment or at such later date as the Court might permit. As a matter of strict procedural requirements, it is impossible to try a defendant before his plea. In this case, it was expected that Rodriguez would certainly be arraigned before the expiration of the six-month period.
>
> Opinion of September 18, 1975, at 3-5.

Judge Bartels also concluded that there was no excuse for the delay in arraignment, and thus no excusable neglect.

The panel decision found a delay beyond the six months in arraigning Rodriguez not to have violated the six-month rule because the District Judge was in a position to dispose of the case by re-setting the date for trial and because exceptional circumstances excused the delay.

ARGUMENT

The decisions of both the District Judge in dismissing the indictment and the panel in reversing that order were based on United States v. Bowman, 493 F.2d 594 (2d Cir. 1974):

> Our purpose was to insure that the government would file its notice or readiness only after pleading and that, absent exceptional circumstances permitting an extension of time pursuant to Rule 5(h), this must be done within the six-month period following arrest, after excluding any other periods as authorized by Rule 5. Even though the government might be ready to go to trial at an earlier date, its readiness could not become effective as a practical matter until issue had been joined, whereupon the case could be assigned to a judge for all purposes, including the disposition of pretrial motions and the conduct of the trial itself.
>
> (Id., 493 F.2d at 597.

As a matter of law, the panel is incorrect when it states that, like Bowman, "the Government notified the court of its readiness in timely fashion." A written notice of readiness was filed in this case on May 2, 1975. At that time Mr. Rodriguez had not been indicted because the prosecutor was not intending to proceed against him. Next, on May 19, 1975, before Rodriguez was indicted, the Government orally announced that it would be ready to proceed against Mr. Rodriguez. The last written notice of readiness was filed on June 30, 1975 -- almost a full month beyond the six month period.

The last notice of readiness was clearly not timely. The first notice of readiness was filed at a time when the Government had decided not to prosecute Mr. Rodriguez; it simply did not apply to him.

The oral statement was made prior to Mr. Rodriguez' being indicted. There was no way the Government could be ready for trial at that point. Indeed, the prosecutor did not even assert present readiness -- only that he would be ready some time in the future.

For all of this Court's concern that qualified Government attorneys cognitively understand the meanings of the words of the Rules (see, e.g., United States v. Drummond, 511 F.2d 1049 (2d Cir. 1975); United States v. Bowman, supra, 493 F.2d 594), it cannot be said that the meaning of "being ready" has ever signified anything but that. The Rule says that the Government "must be ready for trial," and

> ... the Government is put on notice that if it does not comply with the Rules, which provide ample leeway for the legitimate needs of preparing a prosecution, it will be foreclosed from proceeding with the prosecution.
>
> Hilbert v. Dooling, 476 F.2d 355, 357 (2d Cir. 1973), cert. denied, 414 U.S. 878 (1973)

Even in United States v. Pierro, 478 F.2d 386 (2d Cir. 1973), where the Government took the position that its readiness for trial did not need to be communicated to anyone, it did not dispute, and this Court held, that the Rule meant the Government must "be ready for trial." Id., 478 F.2d at 388. In

United States v. Pacelli, 470 F.2d 67 (2d Cir. 1972), cert. denied, U.S. ( ), this Court rejected any notion that a qualified notice of readiness meant that the Government was announcing future readiness:

> The court correctly held that the speedy trial rules were not violated, since the government had timely declared its readiness and the ten-day notice requested by the government was not binding on the court. The court could have called the parties to trial without the ten-day notice.
>
> Id., 470 F.2d at 69.

The Government's oral statement is untrue (see United States v. Pierro, supra, 478 F.2d at 388, n.2). The prosecutor could not have been ready for trial because Mr. Rodriguez had not yet been charged in an indictment* or arraigned, and he had not waived indictment.

Thus, at no point was a simultaneously truthful and timely notice of readiness given to the District Court.

Not only was no arraignment held before filing a notice of readiness, but the arraignment was not even held prior to the expiration of the six month period. The Government, which, under Eastern District local rule (2)(b), controls the date of arraignment, itself set the date of the arraignment two days beyond the six month period. There being no de minimus period

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*In the face of the arrogant assurance by the Assistant U.S. Attorney that he "would indict" Rodriguez that afternoon, defense counsel appropriately responded that the Assistant U.S. Attorney was merely voicing an intention and that Rodriguez was not indicted and might not be.

under the Rules (United States v. McDonough, 504 F.2d 67 (2d Cir. 1974)) , it was the prosecutor himself who violated the time period. The Assistant U.S. Attorney was aware of the possibility of a violation -- defense counsel had told him about it earlier.

The panel found the three-day delay to be due to exceptional circumstance. The circumstance found to be exceptional was that the evidence tying Rodriguez to the crime came from an informer not interviewed by the Assistant U.S. Attorney until the Saturday preceding the Monday set for trial. The panel terms this critical evidence a "fresh lead." The Government itself did not make this argument, either before Judge Bartels or to this Court. To have done so would have been absurd because it is refuted by the record. Mr. Rodriguez was arrested on December 3, 1974, moments after the arrest of the LaBoys. Mr. Rodriguez was arrested because a Government informer told a surveillance agent at the location of a drug sale that Rodriguez was involved (see minutes of trial of Luis LaBoy). At the arraignment Ronald Melvin, the Government undercover agent, swore a complaint in which he stated that a reliable informant told him that Rodriguez was present during negotiations for the purchase of drugs. Based on this affidavit, there was a judicial determination by the magistrate that there was probable cause to believe tnat Rodriguez had been involved in a crime.

Whatever the basis for the prosecutor's subsequent decision not to present the case against Rodriguez to the grand

jury, these initial stages in the proceedings clearly show that the source of the evidence against Rodriguez was the informer in this case. An examination of the complaint or a conversation with Melvin, the undercover agent, makes that clear. This was no fresh lead. The informer and his information were available to the Government prior to the moment of the arrest: the information was the basis of an arrest, criminal charges, assignment of counsel, the setting of bail, and overnight incarceration. Contrary to the panel's position, the Government attorney had every reason to interview the informer earlier than on the eve of trial; apparently only he could tie Rodriguez to the alleged crime.

We do not presume to tell the prosecutor how to manage a case. But if he chooses to disregard the information included in documents filed before the court by the prosecutor in behalf of his position, he must suffer the consequences of his own incompetence.

The panel not only excuses the prosecutor's procedure here, but approves it, saying that interviews of witnesses by the Government can be delayed until the eve of trial because

(1) an interview held immediately before trial rather than earlier makes the witness' accuracy and recollection better;

(2) such an interview avoids duplicative work in the event of case re-assignment in the prosecutor's office.

These "weighty interests," as they are termed (slip op. at 34), are inconsistent with the goals and practices of the criminal process, as well as prompt disposition of criminal cases. As happened here, the practice of interviewing witnesses just before trial will often necessitate an adjournment of the trial, resulting in disruption of schedules of both the court and defense counsel.* Since a trial is usually set beyond the six-month period, the delayed interview means that the Government will not actually be ready for trial when it files its notice of readiness.

Further, Rule 12, Federal Rules of Criminal Procedure, requires that certain defenses or objections, motions to suppress, and requests for discovery (Rule 16), or severance (Rule 12), be made prior to trial at a schedule set by the court. Under Rule 12(d), at arraignment, or as soon thereafter as is practicable, the Government may give the defendant notice, or the defendant may request notice of evidence to be used by the Government which may be subject to a motion to suppress. A regular practice by the Government of delaying its investigation until just prior to trial is inconsistent with the whole scheme of these pretrial proceedings.

Delayed interviewing of known witnesses is also inconsis-

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*Since the Rules also require defense and prosecution counsel to give up cases which are scheduled for trial at times not suitable to them, sudden adjournments and rescheduling of cases will often cost a defendant additional counsel fees, or, if counsel is assigned, be an added cost to the Government.

tent with the court's control of the case. Pretrial orders for discovery and inspection cannot be complied with if the Government has failed to examine its evidence or know how its witnesses will testify until the eve of trial. While there is a continuing duty to disclose (Rule 16(c)) , and there are penalties for failure to comply with court orders (Rule 16(d)(2)), having to resort to these provisions may well delay the trial and the judge's schedule.

The practice approved by the panel will make the prosecutor unable to evaluate or present to the court for consideration prior to trial material for disclosure under Brady v. Maryland, 373 U.S. 83 (1963), or Bruton v. United States, 391 U.S. 123 (1968). This may result in delayed trials or, indeed, in dismissal of the charges altogether. See, e.g., United States v. Glover, 506 F.2d 291 (2d Cir. 1974).

We must also dispute the panel's own reason for approving delayed interviews, and ask whether it is not better to record a witness' observations of the events as quickly as possible after the events. Then, if necessary, the witness' recollection can be refreshed before trial. This will avoid the fading memory problem encountered in all speedy trial cases.

This list of considerations in favor of prompt interviewing of known witnesses is substantial. Certainly where the witness is known to the Government, there is no inherent reason for delaying the interview, and no public interest in that method of proceeding.

The panel said that the late arraignment was not dispositive because the court was in control and could set a trial date. In fact, Judge Bartels had set a trial date, but was forced by the Government's conduct to abandon it. The later date was only tentative -- July 29 or August 4. The proceedings against the LaBoys finally took place in September. The Government's scheduling of the arraignment date after Judge Bartels departed for vacation and after the six month period required extensive motions under the Rules after Judge Bartels' return, and further, prevented him from keeping any semblance of his own schedule.

The whole course of conduct by the Government here was disorderly and in disregard of both the Prompt Disposition Rules and the other local rules. Judge Bartels was correct in dismissing the indictment. Rehearing should be granted and the order below affirmed.

CONCLUSION

For the above-stated reasons, the petition for rehearing should be granted, the judgment of the panel of this Court vacated, and the order of the District Court affirmed.

Respetfully submitted,

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PHYLIS SKLOOT BAMBERGER,
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January 19, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 493—September Term, 1975.

(Argued November 21, 1975 Decided January 5, 1976.)

Docket No. 75-1371

UNITED STATES OF AMERICA,

Appellant.

—against—

ISRAEL RODRIGUEZ,

Appellee.

Before:

MOORE and TIMBERS, *Circuit Judges*,
and COFFRIN,* *District Judge*.

Appeal by appellant United States of America from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, dismissing appellee Israel Rodriguez's indictment on the ground that appellant did not comply with the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases.

Order vacated and case remanded with instructions that the indictment be reinstated.

* Honorable Albert W. Coffrin of the United States District Court for the District of Vermont, sitting by designation.

PHYLIS SKLOOT BAMBERGER, Esq., New York, N.Y. (The Legal Aid Society, Federal Defender Services Unit, William J. Gallagher, of counsel), *for Appellee*.

EDWARD R. KORMAN, Chief Assistant United States Attorney, Brooklyn, N.Y. (David G. Trager, United States Attorney for the Eastern District of New York, Jonathan M. Marks, Assistant United States Attorney, of counsel), *for Appellant*.

PER CURIAM:

This is an appeal by the United States of America (the "Government") from an order of the United States District Court for the Eastern District of New York, dismissing appellee's indictment on the ground that the Government did not comply with the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases ("Plan"). Appellant argues that notwithstanding its failure to schedule appellee's arraignment less than six months after his arrest, appellee's indictment should not have been dismissed. A chronology of the underlying events facilitates analysis of this argument.

On December 3, 1974, Luis LaBoy, Jose LaBoy and appellee Rodriguez were arrested and charged with possession with intent to distribute three ounces of cocaine. The following day all three were arraigned. The prosecutor decided to seek an indictment charging only the LaBoys, and on February 14, 1975, after hearing the testimony of only one witness, the case agent, the grand jury returned a two count indictment. After the LaBoys interposed not guilty pleas, the case was set down for trial on May 19,

1975, and the Government filed its notice of readiness on May 2, 1975.

During the week-end before the LaBoys' trial, the Assistant United States Attorney ("Government's attorney") prepared for trial by, *inter alia*, interviewing an informant who was expected to testify for the Government. The informant assertedly disclosed evidence of Rodriguez's involvement with which neither the case agent nor the Government's attorney had previously been familiar. Upon this discovery, the Government's attorney notified Judge Bartel's chambers on May 17, 1975, that the Government would request an adjournment of the LaBoys' trial in order to seek a superseding indictment naming Rodriguez as well as the LaBoys. Before learning that Rodriguez was represented by counsel, the Government's attorney also telephoned him on May 18th and asked him if he would come to the courthouse for an interview. Declining the offer, Rodriguez volunteered that he expected to testify for the LaBoys.

On May 19, 1975, the Government formally moved the adjournment of the LaBoys trial to enable it to seek a superseder. The Government also notified the court orally that it would be ready to proceed with trial as soon as Rodriguez had time to prepare a defense. After some discussion the Judge instructed counsel for the LaBoys and Rodriguez to discuss a mutually agreeable trial date. This they did, and they informed the Court that they would be ready on July 29, 1975. (The Judge's long overdue June vacation prevented trial during that month.) Later that same day a superseding indictment was returned which was identical to its antecedent, except for the Rodriguez inclusion in each count.

Eight days later on May 28, 1975, Rodriguez was notified that arraignement on the superseding indictment had been

scheduled for June 5, 1975, two days after the expiration of the six months' period which followed Rodriguez's arrest. The arraignment was adjourned until June 6th, at which time all three defendants interposed not guilty pleas. On June 30, 1975, the Government filed a formal written notice of readiness for the rescheduled trial.

Subsequently the appellee moved to dismiss the indictment. After a hearing the Court granted the motion, relying on *United States* v. *Bowman*, 493 F.2d 594 (2d Cir. 1974).[1] *Bowman* held that in the absence of exceptional circumstances, the failure to arraign a defendant within the six months' period violates the Southern District Plan notwithstanding the Government's readiness to proceed before the expiration of those six months. The *Bowman* rationale is that a notice of readiness cannot become effective as a practical matter until such time as the case is assigned for all purposes to a judge, who is then in the position to achieve the Plan's objective of prompt case disposition. In the Southern District such assignment is not made until after arraignment, and since the defendant in *Bowman* was not arraigned until after the Plan's six months' period had expired, the Government's notice of readiness did not become effective within that time limitation.

That case and this one share several factual similarities. In both the Government notified the court of its readiness in timely fashion, and in neither was the defendant arraigned until after the Plan period expired. Also, the Government has belatedly acknowledged that, as is true of the Southern District, in the Eastern District a trial judge

1 After additional argument on the Government's motion for reconsideration of the September 8th order, the lower court entered a second Memorandum and Order adhering to its previous decision.

normally does not exercise control of a case until after the United States Attorney schedules arraignment.[2]

But here, unlike *Bowman*, the achievement of the ultimate objective of an arraignment-within-six-months rule obviates the utility of its application. Immediately following the Government's discovery of additional evidence and concomitant adjournment motion, the lower court rescheduled the trial for the next available date. The Court could do no more to promptly process the case. Nor would an earlier arraignment have had any effect on the Court's calendar schedule. Since the *Bowman* arraignment rule is not an end in itself, where its objective has been achieved by other means, its application would defeat justice, not serve it.

The lower court also faulted the Government for failing to more promptly examine its informant. The Court reasoned that more thorough case preparation would have obviated appellant's dilemma by uncovering the evidence incriminating Rodriguez well before the expiration of the Plan's applicable six month period. Thus, the lower court charged the Government with the elapsed time from appellee's arrest on December 3, 1974, until his indictment was returned on May 19, 1975.

We disagree with this analysis. The Government's attorney had no reason to interview the witness prior to the eve of trial. Unless we say that in every case the Government must call every potential witness before the grand jury, the Government's procedure was reasonable and proper. Indeed, the delay occasioned by the pre-trial interview disclosures further distinguishes *Bowman*. Pursuant to rule

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2 Although a case in the Eastern District is assigned to a judge upon filing of an indictment, the United States Attorney is responsible for scheduling arraignment pursuant to local Rule 2(b). Consequently the court often refrains from prodding the case forward until after the United States Attorney discharges those obligations.

5(h) of the Plan, delay attributable to "exceptional" circumstances is excluded from the computation of the time within which the Government must be ready for trial. As a preliminary hurdle, to qualify as "exceptional" the circumstances must not be something with which the Plan's drafters were familiar. *United States* v. *Faraloro*, 493 F.2d 623 (2d Cir. 1974). If the circumstances are sufficiently extraordinary, a further analytical step requires balancing the public interest in prompt adjudication against competing interests served by the exception. *United States* v. *Rollins*, 487 F.2d 499 (2d Cir. 1973).

While pre-trial witness interviews are perfectly mundane, the disclosures precipitated by the pre-trial interviews in this case are not. It is fanciful to suppose that the drafters envisioned a situation where, in the course of preparation for one criminal case, fresh leads volunteered by government witnesses would warrant the institution of an additional criminal case against a defendant whom the Government's attorney had previously decided not to indict. Such circumstances are sufficiently extraordinary to warrant a balancing analysis of the competing interests affected.

First and foremost, we confront the interest which explains the Government's deferral of the informant's pre-trial interview until the eve of trial--effective case preparation. At a trial soon after a pre-trial interview the witness' recollection and accuracy may often be better than it would be if the interview had antedated the trial by several months. Such interview scheduling also minimizes the risks of duplicative preparation in the event of case re-assignment within the prosecutorial office. These interests are weighty, and if we were to hold that the delay under the circumstances was not "exceptional", they would be severely infringed. The Government could avoid dis-

missal of comparable indictments *in futuro* only by interviewing all of its trial witnesses in every criminal case months before trial. The harm this would effect is obvious.

This consideration outweighs all other pertinent factors. Appellee was not prejudiced by the delay. After ordering the Government to turn over all material to him which it had previously conveyed to the LaBoys, the lower court expressly reserved appellee's rights to make subsequent discovery motions. Appellee was arraigned eight days after he was indicted and only two days after the expiration of the six month period following his arrest. We also note that the application of Rule 5(b) in such circumstances is not susceptible of prosecutorial exploitation. The Government has no way of knowing whether or when expected witnesses will disclose new evidence inculpating an unindicted party. The assertion by the Government that new evidence has been discovered may always be explored, as it was below, at a hearing on a motion to dismiss.[3] We conclude that at least three days are excludable from the period of time following Rodriguez's arrest, and since their exclusion renders the Government's oral notice effective within the Plan period, we reverse and remand for further proceedings.

The order of the district court is vacated with instructions that the indictment be reinstated.

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3 Appellee obliquely intimates that the Government decided to indict Rodriguez solely to deter him from testifying for the LaBoys, but nothing in the lower court order or memorandum bears this out. On the contrary it appears that the decision to seek an adjournment in the LaBoys trial was made *before* the Government's attorney was informed by Rodriguez that he intended to testify against the Government.

CC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-against- :

75-CR-431

ISRAEL RODRIGUEZ, :

Defendant. :

Appearances:

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Of Counsel

BARTELS, District Judge

The defendant, Israel Rodriguez, moves pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure to dismiss the indictment against him because of the Govern-

(4)

ment's failure to comply with Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases adopted pursuant to Rule 50(b). Rule 4 provides that:

> "In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed."

On December 3, 1974, Rodriguez was arrested with two co-defendants, Luis Laboy and Jose Laboy, and was charged with possessing cocaine with intent to distribute the same in violation of 21 U.S.C. §§841(a)(1) and 846. All three defendants were arraigned before a U.S. Magistrate on December 6, 1974, and pleaded not guilty and subsequently, on February 13, 1975, all of the defendants except Rodriguez were indicted. On May 19, 1975, the defendants Luis Laboy and Jose Laboy appeared for trial before this Court but the Government requested an adjournment on the ground that new information made it apparent that Rodriguez should also be

indicted and tried with the other two defendants. An adjournment to July 29, 1975, was granted in the presence of and with the consent of Ms. Joanna Seybert, counsel for Rodriguez, who had been appointed by the Magistrate at Rodriguez's arraignment on December 6, 1974, after his arrest. Rodriguez was subsequently indicted in the afternoon of May 19, 1975, and the indictment was filed on May 20, 1975. Two and one-half weeks later, on June 6, 1975, Rodriguez was arraigned on the indictment and pleaded not guilty. On June 30, 1975, the Government filed its Notice of Readiness.

Rodriguez claims that the six-month period for readiness as contained in Rule 4, supra, expired on June 3, 1975, and that the indictment should be dismissed because the Government failed to both schedule the arraignment on the indictment and file its notice of readiness prior to that date. In response the Government claims that it was actually ready to proceed to trial on May 19, 1975, a date within the six-month period, and that its readiness to so proceed was actually conveyed in open court to the defendant and his attorney, thereby making unnecessary the mere technicality of filing a formal written notice of readiness.

It is not disputed that the six-month period is to be measured from December 3, 1974, the date of arrest, and the Government does not claim any exclusions of time pursuant to the provisions of Rule 5 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases. Therefore, there is no question that the six-month period expired on June 3, 1975, and that the Government was required to comply with Rule 4 prior to that date. We find, however, that the defendant was not calendared for a pleading on the indictment until three days after the expiration of the six-month period.

Here the Government's failure to file a written notice of readiness prior to June 3, 1975, is not fatal since actual notice of readiness was given to the defendant on May 19, 1975, and the Government was actually ready to proceed to trial on that date subject to Rodriguez being indicted. After hearing arguments for both sides, the Court faults the Government in two respects: (A) failure to indict Rodriguez between December 3, 1974 and May 19, 1975, and (B) failure to insist on an arraignment on the indictment prior to June 3, 1975. The Government attempts to explain its failure to indict Rodriguez until May 19, 1975, on the

ground of newly discovered evidence from an informant. It must be noted, however, that the reason for the delay in receiving this new information was the failure on the part of the attorneys for the Government to interview the informant until two days prior to the scheduled trial date despite the fact that his identity was known. Instead of interviewing the informant himself, the Government chose to rely solely on an agent's report concerning the information available from the informant. This clearly amounted to inadequate investigation.

Referring to the second fault, which is fatal to the Government, the Government had two and one-half weeks to arraign Rodriguez prior to June 3, 1975, without doing so. In United States v. Bowman, 493 F.2d 594 (2d Cir. 1974), clarifying United States v. Valot, 473 F.2d 667 (2d Cir. 1974), the defendant was arrested on November 16, 1972 and indicted on May 8, 1973. On May 9, 1973, the Government filed its notice of readiness and on May 21, 1973, the defendant was arraigned on the indictment. The six-month period expired on May 16, 1973, and the defendant was not arraigned until five days after the expiration of that period despite the fact that the Government's notice of readiness was filed

prior to the expiration of the period. The Court found that a notice of readiness is not effective as a practical matter until issue is joined and accordingly held that within the six-month period the Government must require the defendant to plead and it must file its notice of readiness. Although the Court found excusable neglect in the Government's failure to have the defendant arraigned within the six-month period, caused by understaffing arising from the transition in the United States Attorney's office, it made it quite clear that a similar neglect in the future would not be tolerated.

Here, unlike Bowman, the Government's failure was not occasioned by excusable neglect and the principle there outlined is dispositive of this case. Joinder after the six-month period in the circumstances of this case made it impossible to try the case before the expiration of that period, even though the Government might have been ready for trial before joinder in view of its prior preparation to try the two co-defendants. While such a result may seem to be harsh on the Government, it is necessary to prevent the circumvention of Rule 4 by indicting and filing a notice of readiness on the eve of the expiration of the six-month

period and the delaying arraignment for several weeks. Here Rodrigues did not waive his right to be arraigned within the six-month period and, consequently, the indictment must be and hereby is dismissed.

SO ORDERED.

Dated: Brooklyn, N.Y.,
September 8, 1975.

John R. Bartels
United States District Judge

cc

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- :

ISRAEL RODRIGUEZ, : 75-CR-431

Defendant. :

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BARTELS, D.J.

MEMORANDUM-DECISION and ORDER

The United States moves for reconsideration of the Court's decision of September 8, 1975, granting the motion of the defendant Israel Rodriguez to dismiss the indictment against him for the Government's failure to comply with Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases ("the Rules"). After hearing reargument and examining the additional briefs, the Court adheres to its original decision of September 8, 1975. Accordingly, the order dismissing the indictment must stand.[1/]

The Government argues that the case of United States v. Bowman, 493 F.2d 594 (2d Cir. 1974), which construed Rule 4 of the Rules, does not require the harsh result of a

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dismissal of the indictment under the unusual and unique circumstances of this case, and that the Government has in fact complied with the Rule as interpreted by the Court in Bowman. Alternatively, it contends that if it failed to comply with Rule 4 of the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases ("the Plan"), that failure was the result of excusable neglect.

While a restatement of the series of events outlined in our prior decision is unnecessary, the Government points to two special facts which it claims distinguish this case from Bowman. These facts are that on May 19, 1975, (1) the Court, with the consent of Rodriguez's attorney, set July 29, 1975 as the trial date for all three defendants, a date which was adjourned to September 16, 1975, at the Court's request, and (2) the Court ordered discovery to be completed by Rodriguez's attorney. It is the Government's position that the reason for the Court's insistence in Bowman on an arraignment prior to the expiration of the six-month period, was that in the ordinary case it is only after arraignment that "the case could be assigned to a judge for all purposes, including the disposition of pretrial motions and the conduct of the trial itself." Id. at 597.

Accordingly, the Government concludes that since in this case a trial date had been set and discovery ordered, unlike in Bowman, Rule 4 was satisfied as far as readiness was concerned, and that the requirement of an arraignment prior to the expiration of the six-month period was a mere empty formality.

This argument, however, ignores the simple fact that Rule 4 of the Plan required the Government to be ready for trial within six months from the date of Rodriguez's arrest and that having failed to arraign Rodriguez within that six-month period, it could not possibly have been ready for trial until three days after the six months since until arraignment it would have been impossible to try the case. Again the Court must emphasize the striking factual similarity of both Bowman and United States v. Valot, 473 F.2d 667 (2d Cir. 1974), to the present case. In both of those cases the Government filed its notice of readiness within the six-month period but failed only to have the defendant arraigned within that time. While the Bowman Court did not require that the case be actually tried within the six-month period, it held that in order to be ready for trial the Government must first arraign the defendant. The essence of that

requirement and the concern of the Court were to insure the prompt disposition of criminal cases by avoiding all forms of prosecutorial delay, including delay in arraignment. The Court remarked:

> "The scheme of the Plan, like the Second Circuit Rules which preceded it, was not to 'mandate trial within a specified time' but to focus 'primarily on prosecutorial delay as a means of implementing the public interest in disposition of criminal charges with reasonable dispatch.' Hilbert v. Dooling, supra, 476 F.2d at 357."

An arraignment serves a much more important purpose than simply providing a time for the assignment of a judge, who in turn will set a trial date and order discovery; as stated in Bowman, the purpose of Rule 4 was "to insure that the government would file its notice of readiness only after pleading." Id. It is true that while on May 19, 1975, all material turned over to the other defendants was ordered delivered to Rodriguez, 2/ his counsel was expressly accorded the right to make any motions at a later date. Under Rule 16(f) Rodriguez had a right to make discovery motions at any time within ten days after arraignment or at such later date as the Court might permit. As a matter of strict procedural requirements, it is impossible to try a defendant before his

plea and for that reason the setting of a trial date is meaningless before the defendant has entered his plea. In this case it was expected that Rodriguez would certainly be arraigned before the expiration of the six-month period.

Turning now to the question of excusable neglect, we believe that it is clear from Bowman that the failure to arraign the defendant within six months does not fall within the category of excusable neglect as is manifested by the last paragraph of the Court's decision where it stated:

> "Our decision does not mean that a similar practice on the part of the prosecutor will be countenanced in the future. Having now had fair warning of our clarification of the Valot remand, he must at the risk of dismissal of an indictment conform to the six-month requirement as herein clarified."

The Government seems to think that this result is too harsh and unwarranted under the straight-jacket theory of United States v. Pierro, 478 F.2d 386, 389 (2d Cir. 1973). The Court does not agree because after the trial was adjourned from May 19, 1975 to July 29, 1975, caused by the dilatory indictment of Rodriguez, the Government had ample time to arraign him within the time period and its failure to do so was the second time that the Court was presented with a form of prosecutorial delay. No reason for its failure to timely

arraign Rodriguez was offered.

Therefore, under these circumstances, we find that the Government failed to comply with Rule 4 of the Plan and that such failure was not occasioned by excusable neglect, and the indictment against Israel Rodriguez is dismissed.

SO ORDERED.

Dated: Brooklyn, N.Y.,
September 18, 1975.

Edward R. Bartels
United States District Judge

FOOTNOTES

1/ It should be noted that the controversy arises under the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases ("the Plan") promulgated pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure and not under the antecedent Rules as indicated in the Court's prior decision. Rule 4 of the Plan provides:

> "In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days."

The Government, however, concedes that in substance Rule 4 of the Plan and Rule 4 of the Rules are identical.

2/ This situation would not be present if there were no co-defendants. Thus, an arraignment would assume greater importance in the absence of other defendants who had been previously arraigned.

CERTIFICATE OF SERVICE

Jan 19, 1975

I certify that a copy of this petition for rehearing with suggestion for rehearing en banc has been mailed to the office of the U.S. Attorney for the Eastern District of New York.

Ruth Ann Bowles